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Recognition by Circumvention: Enforcing Foreign Arbitral Awards as Judgments under the Parallel Entitlements Approach

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NOTE

RECOGNITION BY CIRCUMVENTION: ENFORCING FOREIGN ARBITRAL AWARDS AS JUDGMENTS UNDER THE PARALLEL ENTITLEMENTS APPROACH

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INTRODUCTION

The globalization of business has resulted in the proliferation of international commercial partnerships and multinational corporations that operate in both civil and common law countries. As such, modern commercial transactions frequently include parties from disparate legal cultures with different notions of fair process. But like any business relationship, international commercial bonds can break down, leaving each party to seek what it conceives as a fair resolution. Consequently, the procedure for resolving such disputes has become important.[1]

Each party to an international agreement wants to resolve disputes according to familiar rules and a fair process before a trusted and impartial decision maker.[2] Accordingly, such parties may prefer arbitration to litigation because it affords them the freedom to define the contours of the dispute resolution process.[3]

Perhaps more saliently, arbitration allows parties to avoid navigating a foreign court system, the difficulties of which could impose unnecessary strain on their commercial relationships.[4] In addition, even if a party is able to obtain a favorable judgment through litigation, it faces yet another obstacle: it must still execute that judgment against the assets of the losing party.[5] Executing a foreign judgment requires the winning party to take the judgment to a foreign country's court system (often that of the losing party) to obtain a new judgment from a court with coercive power over the losing party.[6] This process can be arduous and unpredictable because no multilateral covenant gov-

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1 *See* William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 19, 26 (1998) (noting the importance of contractual forum selection mechanisms).

2 *See* Russell Bennett Stevenson Jr., *An Introduction to ICC Arbitration*, 14 J. INT'L L. & ECON. 381, 381–85 (1980).

3 *See id.*

4 *See* Samuel V. Goekjian, *ICC Arbitration from a Practitioner's Perspective*, 14 J. INT'L L. & ECON. 407 (1980); Park, *supra* note 1, at 26; Stevenson, *supra* note 2, at 381.

5 *See* Parikshit Dasgupta, *Securitization: Crossing Borders and Heading Towards Globalization*, 27 SUFFOLK TRANSNAT'L L. REV. 243, 261 (2004). With the emergence of multiparty litigations in which judgment holders could potentially obtain multiple judgments against several parties, the judgment enforcement process becomes even more cumbersome.

6 *See id.* at 261.

erning the recognition and enforcement of foreign judgments currently exists.[7]

In contrast, arbitration has become an important alternative to litigation largely because of the Convention on tbe Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[8] which has facilitated the process of executing foreign arbitral awards.[9] At the time of this writing, the New York Convention had 142 signatories,[10] including the United States, which acceded to the convention after Congress passed implementing legislation in 1970.[11]

The New York Convention facilitates the judgment enforcement process by requiring its signatories to recognize and enforce an arbitral award absent one of seven narrow infirmities delineated within the treaty.[12] If the reviewing court finds that any of these defects exists, it *may* refuse to enforce the award.[13] However, because the New York Convention attempts to enhance the appeal of arbitration as a dispute-resolving mechanism by making arbitral awards easier to

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7 *See id.* Nation-states and international bodies have repeatedly attempted, without much success, to draft such international treaties. For example, from 1976 until 1981, the United States and the United Kingdom initiated and took part in negotiations over the proposed "Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters." This effort ultimately proved fruitless. *See* Brian Richard Paige, Comment, *Foreign Judgments in American and English Courts: A Comparative Analysis*, 26 SEATTLE U. L. REV. 591, 622 (2003). In addition, the Hague Convention on Private International Law recently attempted to draft a similar treaty. *See id.* However, no such treaty appears to be forthcoming given the disagreement between states over such issues as jurisdiction, e-commerce, and intellectual property rights. *See id.* at 623.

8 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

9 *See* Island Territory of Curacao v. Solitron Devices, 356 F. Supp. 1, 14 (S.D.N.Y. 1973) (citing a House Committee Report stating that encouraging the arbitration of foreign disputes involving American businesses was a primary purpose of adopting the New York Convention).

10 For a complete list of signatories including every major world power and their dates of accession, see Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Jan. 6, 2007). The large number of signatories allows commercial parties to utilize arbitration because the provisions of the New York Convention will bind many international court systems.

11 *See* Comment, *Foreign Judgments Based on Foreign Arbitral Awards: The Applicability of Res Judicata*, 124 U. PA. L. REV. 223 (1975) [hereinafter *Foreign Judgments*].

12 *See* New York Convention, *supra* note 8, art. V (listing the following as grounds for refusal: an invalid agreement in writing, failure of notice to a defaulting party, an award transcending the scope contemplated by the parties, the failure of an arbitral tribunal's composition or procedure to conform to the agreement of the parties, the lack of a final award or a decision setting aside an award in the country where rendered, nonarbitrable subject matter, and an award contrary to the public policy of the state where recognition and enforcement are sought). The first five defects under Article V, known as the Article V(1) defenses, relate to procedural defects in the initial arbitration process, while the latter two defects, known as the Article V(2) defenses, cover potential objections by the enforcing state to the substance of the award. *See id.*

13 *See id.*

execute, nothing in the treaty prevents a reviewing nation from electing to enforce a flawed award.[14] The New York Convention also contains a "more favorable right" provision, which states:

> The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.[15]

Thus, none of the New York Convention grounds for refusal is an automatic bar to the award holder's recovery. Instead, each constitutes a permissive ground to deviate from the convention's mandate to recognize and enforce foreign arbitral awards.[16]

One of the limited grounds for refusing recognition and enforcement of an arbitral award is triggered when a competent authority in the rendering state sets aside the award.[17] Set aside entails a court refusing to recognize the award's validity under its own domestic law.[18] While the New York Convention does not entitle the award-holding party to recognition or enforcement in such cases, the award holder might nonetheless be able to obtain foreign recovery upon the award despite the set aside.[19] However, because set aside poses a potential obstacle to foreign enforcement, litigation over the validity of the award will often occur in the forum where the award originated either prior to or simultaneous with the award holder's taking it abroad for enforcement.[20] The litigation in the award-rendering state can occur with the award-holding party either as a defendant arguing against the loser's action to set aside the award or as a plaintiff seeking a judgment confirming the validity of its award in the rendering state's court system.[21]

If the party challenging the validity of the award prevails and the court invalidates the arbitral award, the party may use the New York Convention's ground for refusal based on set aside as a defense if the award holder seeks to enforce the award abroad.[22] In this case, the

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14 *See id.*; Llewellyn Joseph Gibbons, *Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 57 (2002).

15 New York Convention, *supra* note 8, art. VII(1).

16 *See id.* art. V; Gibbons, *supra* note 14, at 57.

17 *See* New York Convention, *supra* note 8, art. V(1)(e).

18 *See* Catherine A. Giambastiani, Recent Development, Lex Loci Arbitri *and Annulment of Foreign Arbitral Awards in U.S. Courts*, 20 AM. U. INT'L L. REV. 1101, 1107 (2005).

19 *See, e.g.*, Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996); Ray Y. Chan, Note, *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of* Chromalloy, 17 B.U. INT'L L.J. 141, 208 (1999).

20 *See Foreign Judgments*, *supra* note 11, at 226–28.

21 *See id.*

22 *See supra* notes 17–19 and accompanying text.

New York Convention anticipates the possibility of inconsistency between a foreign arbitral award and a foreign judgment negating its validity in the rendering state. Article V of the Convention explicitly resolves this potential inconsistency by allowing the state in which the award holder seeks enforcement to decide whether to follow the arbitrator's award or the foreign court's judgment.[23]

However, the Convention does not address the potential for *consistency* between a foreign arbitral award and a judgment in the rendering state. What happens if the award bolder prevails and secures a foreign judgment that upholds the validity of the arbitral award? How should such a foreign judgment relate to the award itself? If the award holder then seeks recognition and enforcement from a court of a signatory to the New York Convention, what factors should guide the decision of that court?

Despite a paucity of literature and case law on this issue, it seems that the few American courts and scholars that bave tried to resolve the relationship between foreign awards and confirmation judgments have argued for treating the award and the judgment as distinct entitlements, either of which the holder may execute.[24] Therefore, this approach treats arbitral awards and confirmation judgments as "parallel entitlement[s]"[25] and gives the party that prevailed in the initial arbitration two avenues through which to pursue relief. The party may either seek recognition and enforcement of the arbitral award under the New York Convention or attempt to enforce the rendering state's judgment under provisions for recognizing foreign judgments in the enforcing state.[26] The United States' commitment under the New York Convention to promote arbitration seems to justify perceiving arbitral awards and confirmation judgments as parallel entitlements because such an approach confers an additional ground for recognition upon the award holder, thereby making enforcement more likely and enhancing the appeal of arbitration.[27] Indeed, the

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23 *See supra* note 19 and accompanying text.

24 *See* Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 29 F.3d 79 (2d Cir. 1994); Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 713–14 (2d Cir. 1987); *In re* Waterside Ocean Navigation Co., 737 F.2d 150, 154 (2d Cir. 1984); Fotochrome, Inc. v. Copal Co., 517 F.2d 512 (2d Cir. 1975); Island Territory of Curacao v. Solitron Devices, 489 F.2d 1313 (2d Cir. 1973); Oriental Commercial & Shipping Co. v. Rosseel, N.V., 769 F. Supp. 514, 516 (S.D.N.Y. 1991); ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 346 (1981); *Foreign Judgments*, *supra* note 11, at 223; *see also* Fratelli Damiano snc v. August Topfer & Co., Award No. 117 (Corte di cassazione, Mar. 13, 1991), *reprinted in* 17 Y.B. COM. ARB. 559 (1992) (representing a similar foreign perspective: an Italian court supporting the parallel entitlements approach).

25 TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 688 (3d ed. 2006).

26 *See id.*

27 *See infra* Part I.B.2.

parallel entitlements approach goes beyond the New York Convention's requirements by allowing an award-holding party to secure enforcement of an award that may be deficient under the Convention itself.[28]

While at first glance this issue might seem to be mere "procedural underbrush,"[29] the manner in which a party decides to pursue its entitlement in the United States has important consequences for litigation strategies as well as national policy. Causes of action to recognize and enforce a foreign arbitral award have shorter statutes of limitations than those to enforce a foreign judgment.[30] As such, a court recognizing both entitlements may allow a plaintiff to file a claim based on a stale award under the pretext of a foreign judgment.[31] Further, enforcing an arbitral award as a judgment may deny defendants a formal means of pleading the defenses that would ordinarily apply to defective arbitral awards under the New York Convention.[32] Finally, because the New York Convention applies in the United States as a matter of federal law,[33] whereas parties usually seek to enforce foreign judgments as a matter of state law,[34] allowing a litigant to pursue enforcement of either the arbitral award or the foreign judgment may have important ramifications for jurisdictional tactics as well as conflict-of-laws issues.[35] In each of these ways, the parallel entitlements approach allows a party to circumvent the procedures for recognition and enforcement of foreign arbitral awards laid out in the

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28 *See infra* Part III.

29 *Foreign Judgments*, *supra* note 11, at 248.

30 *See infra* Part III.B.1.

31 *See* Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 29 F.3d 79 (2d Cir. 1994). For a full treatment of the statute of limitations issue in this case, see *infra* Part III.B.1.

32 *See* Ocean Warehousing B.V. v. Baron Metals & Alloys, 157 F. Supp. 2d. 245 (S.D.N.Y. 2001); *infra* Part III.B.2.

33 The United States implemented the New York Convention through federal legislation codified in 9 U.S.C. §§ 201–208 (2000). This legislation grants original jurisdiction to federal district courts for such actions and deems such actions to "arise under the laws and treaties of the United States." *Id.* § 203. It also facilitates the removal of such cases to federal court. *See id.* § 205. As such, federal question jurisdiction exists for enforcement claims under the convention via 28 U.S.C. § 1331, and they can be readily removable from state to federal court without regard to the citizenship of the parties by 28 U.S.C. § 1441(b).

34 Many states have legislation regarding the recognition of foreign judgments. *See, e.g.*, Island Territory of Curacao v. Solitron Devices, 489 F.2d 1313, 1318 (1973) (discussing New York's passage of the Uniform Foreign Money-Judgments Recognition Act, N.Y. C.P.L.R. §§ 5301–09 (McKinney 1997)). At the time of this writing, forty-three of the fifty states, the District of Columbia, and the Virgin Islands had passed some version of the Act. N.Y. C.P.L.R. art. 54 (McKinney 1997). No analogous federal law exists for the recognition and enforcement of foreign money judgments. As such, parties can assert these state law claims in federal courts only if diversity jurisdiction exists.

35 *See infra* Part III.B.3.

New York Convention and its implementing legislation[36] by seeking enforcement of the same underlying award as a foreign judgment.

The New York Convention allows a party holding a foreign arbitral award to invoke the coercive authority of the courts of a signatory to execute upon its entitlement against the losing party.[37] The Convention binds its signatories to follow its provisions.[38] However, by interpreting foreign confirmation judgments as triggers of independent causes of action, courts have expanded the arsenal of a party seeking to enforce a foreign award beyond that which the Convention requires.[39] While the New York Convention's pro-arbitration motivations support this stance,[40] allowing a party to prosecute a foreign judgment based on an arbitral award in lieu of the award itself may vitiate the policies underlying statutes of limitations, sovereignty, and jurisdiction.

This Note takes the position that because of the significant strategic advantages it creates for award holders, the parallel entitlements approach does not satisfactorily resolve the question of how a foreign arbitral award relates to a foreign judgment confirming it. Courts could achieve proper deference to New York Convention obligations without creating any potential for abuse by viewing confirmation judgments as limited in scope to the country rendering the judgment. Doing so would strike a better balance by allowing American courts to apply res judicata principles of issue preclusion or collateral estoppel to aid plaintiffs in New York Convention cases, while simultaneously preventing plaintiffs from taking advantage of the court system's power of compulsion at the expense of national policy. Part I examines the theoretical possibilities for categorizing the relationship between foreign arbitral awards and foreign confirmation judgments and assesses the validity of these competing views in light of the obligations that the New York Convention imposes. Part II explores the judicial decisions that have adopted the parallel entitlements approach and analyzes their reasoning. Part III attempts to catalogue and explain the ways in which award-holding plaintiffs can take advantage of the parallel entitlements framework. Part IV argues for a slightly modified version of the limited-in-scope approach as a superior model for analysis in this context and develops a proposal for implementing this approach.

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36 *See infra* Part III.

37 *See supra* note 12 and accompanying text.

38 *See id.*

39 *See supra* note 24 and accompanying text.

40 *See infra* Part I.B.

I
THE RELATIONSHIP BETWEEN ARBITRAL AWARDS AND CONFIRMATION JUDGMENTS

A. Theoretical Possibilities

There is relatively little literature about the interaction between the arbitral award and the judgment that arises from a parallel proceeding. To the extent that the question has been raised, however, three possible results have been suggested.[41] One possibility, based on the usual operation of claim preclusion, is that the arbitral award merges into the confirmation judgment. This view contends that the judgment nullifies the award and replaces it with a judgment the party can seek to enforce.[42] However, this "merger" approach becomes problematic if applied outside the country issuing the award.[43] Because the New York Convention applies only to foreign arbitral awards and not to foreign judgments, the extraterritorial merger approach would render the convention inapplicable by converting awards covered by the Convention into judgments beyond its scope.[44]

As such, some scholars have advanced a second view, which holds that the merger occurs only within the rendering state and has no extraterritorial effect.[45] Thus, under this "limited-in-scope" merger theory, the award holder would execute the judgment if pursuing enforcement in the rendering state but would pursue recognition and enforcement of the arbitral award if seeking to recover outside of that country.[46]

In the United States, some courts have adopted a third view of the interaction between a confirmation judgment and an arbitral award.[47] These courts consider the foreign judgment to be a separate and distinct claim from the arbitral award upon which it is based. Therefore, litigation in the rendering state creates parallel entitlements upon either of which the party may take action.[48] As a result,

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41 *See* VÁRADY ET AL., *supra* note 25, at 687–88.

42 *See* VAN DEN BERG, *supra* note 24, at 347 (citing a German case in which the respondent made such an argument).

43 *See id.* at 347–48; *infra* Part I.B.1.

44 *See* VAN DEN BERG *supra* note 24, at 347–48; *infra* Part I.B.1.

45 *See* VAN DEN BERG, *supra* note 24, at 347–48; VÁRADY ET AL., *supra* note 25, at 688; *see also* COSID, Inc. v. Steel Auth. of India (High Court of Delhi, July 12, 1985), *reprinted in* 11 Y.B. COM. ARB. 502, 505 (1986) (holding that a judgment gave the plaintiff two obligations to enforce in a domestic court but had no extraterritorial effect).

46 *See* VÁRADY ET AL., *supra* note 25.

47 *See infra* Part II.

48 *See* V.C. Govindaraj, *Foreign Arbitral Awards and Foreign Judgments Based upon Such Awards*, 13 INT'L & COMP. L.Q. 1465, 1465 (1964). As Govindaraj notes:

> [T]here is consensus among jurists . . . that while non-merger of the original cause of action in the judgment is the rule, conferring on the plaintiff thereby the option either to resort to the original ground of action or to

these courts have been willing to entertain and decide cases based solely on the foreign confirmation judgment.

B. Evaluating the Validity of the Three Approaches in Light of the New York Convention

1. *The Extraterritorial Merger Approach*

Because the merger approach holds that a foreign confirmation judgment replaces the foreign arbitral award, it creates only one narrow route for enforcement—the newly authored foreign judgment.[49] While this approach might be effective in the country where both decisions were rendered, a significant problem arises outside the rendering state: merging the two entitlements makes the otherwise enforceable arbitral award unenforceable because of the rendering state's judgment.[50]

Extraterritorial merger allows a defendant in a proceeding for the recognition and enforcement of an arbitral award filed under the New York Convention to argue that the award's merger with the foreign judgment bars the plaintiff's action upon the award.[51] Thus, under the merger approach, despite affirming the arbitral award's validity, the foreign judgment simultaneously nullifies the award as an enforceable entitlement and forces the plaintiff to pursue relief based solely on the confirmation judgment. Exacerbating this somewhat absurd situation, this approach would in effect render the New York Convention inapplicable by translating actions that fall within its scope (pursuing recognition and enforcement of foreign arbitral awards) into actions beyond its umbrella (filing for the enforcement of foreign confirmation judgments).[52] Because it eliminates the operation of the New York Convention, the merger approach contravenes the treaty's goal of promoting arbitration as an alternate mechanism for resolving international disputes.[53]

In addition to displacing the New York Convention procedurally, the extraterritorial merger approach seems to violate specific provisions of the Convention as well. Because the New York Convention encourages the use of arbitration, it limits the grounds upon which the courts of its signatories can refuse to recognize and enforce a final

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> sue on the judgment recovered . . . the foreign judgment . . . nonetheless creates a legal obligation which may be enforced by action in any country.

Id.

49 *See* VAN DEN BERG, *supra* note 24, at 347.

50 *See id.* at 348 (noting the "absurd situation" created if enforcement in the country of origin results in the award's unenforceability abroad due to res judicata).

51 *See id.*

52 *See id.*

53 *See supra* note 14 and accompanying text.

arbitral award to the seven infirmities outlined in Article V.[54] A signatory that renders an award invalid for a reason other than those seven listed deficiencies violates its obligations under the Convention,[55] and refusal based on the merger of an arbitral award into a judgment arguably constitutes such an invalid justification for nonrecognition because it does not fall within the scope of Article V.[56]

However, one could arguably construe the doctrine of extraterritorial merger within the New York Convention's procedural framework. While the Convention does not specifically list res judicata policies as a basis for refusal, Article V(2)(b) creates an exception if "[t]he recognition or enforcement of the award would be contrary to the public policy of [the reviewing] country."[57] Many courts in the United States, including the Supreme Court, value res judicata as a matter of public policy.[58] Therefore, one could argue that refusing to enforce an arbitral award because it has been converted into a judgment under the merger approach nevertheless meets New York Convention obligations because applying res judicata constitutes refusal as a matter of public policy under Article V.[59] While this argument does not seem entirely unfounded, the public policy ground for denying enforcement of an arbitral award has generally been construed narrowly.[60] Thus, the extraterritorial merger approach seems to create a ground for refusal that falls outside the ambit of the New York Convention.

2. *The Parallel Entitlements Approach*

In contrast to the merger approach, which defeats New York Convention awards by merging them into judgments, the parallel entitlements approach augments the probability of recognizing and

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54 *See supra* notes 12–16 and accompanying text.

55 *See* New York Convention, *supra* note 8, art. V (stating "recognition and enforcement of the award may be refused . . . *only* if" the court finds the award deficient for one of the seven listed grounds) (emphasis added); *see also* 9 U.S.C. § 207 (2000) (incorporating these obligations into the federal statute implementing the New York Convention); Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1066 (1961) (explaining the obligations of signatories to the New York Convention).

56 *See* New York Convention, *supra* note 8, art. V.

57 New York Convention, *supra* note 8, art. V(2)(b).

58 *See, e.g.*, San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 345 (2005) ("The doctrine of res judicata serves vital public interests . . . .") (quotation omitted).

59 At the meetings for drafting the New York Convention, Italy argued that it would handle cases of res judicata under the "public policy" provision in Article V(2)(b). *See* U.N. Doc. E./CONF.26/SR.17, at 15 (1958); *see also* Quigley, *supra* note 55, at 1071 n.93 (noting that Italy's interpretation of "public policy" includes cases of res judicata).

60 *See, e.g.*, Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (limiting use of the New York Convention's Article V(2)(b) public policy ground to cases "where enforcement would violate the forum state's most basic notions of morality and justice").

enforcing awards. Recall that the parallel entitlements approach allows a plaintiff to seek relief under either the foreign arbitral award or the foreign confirmation judgment,[61] and nothing prevents the plaintiff from pressing both claims simultaneously.[62] The parallel entitlements approach facilitates enforcement by allowing the plaintiff an additional mechanism to enforce its award. This result finds support under the "more favorable right" provision in Article VII of the New York Convention,[63] which allows for the recognition and enforcement of arbitral awards under the domestic law of the enforcing state, even if the Convention itself would not obligate that signatory to enforce the award.[64] Because a court's choice to enforce a confirmation judgment enhances the possibility for recognition of the initial arbitral award, the parallel entitlements approach clearly falls within the New York Convention's framework.

3. *The Limited-in-Scope Merger Approach*

Viewing the confirmation judgment's merger effect as limited in scope to the rendering state's own court system seems acceptable under the New York Convention. The limited-in-scope approach views a plaintiff as having only one forum-specific entitlement wherever it presses its claim.[65] In the rendering state, the judgment has merged with the award, leaving the plaintiff with only the judgment to prosecute. Abroad, however, the judgment has no claim-preclusive or claim-expansive effect, leaving the plaintiff with only the foreign award to pursue.[66] In contrast to the parallel entitlements approach, the limited-in-scope approach simply ignores the confirmation judgment for the purpose of evaluating the sufficiency of a plaintiff's claim based on a foreign arbitral award. But confirmation judgments could, and should, still have significant res judicata implications, including important collateral estoppel effects.[67] However, judgments have no effect on whether plaintiffs' claims withstand challenges to their sufficiency such as timeliness or jurisdiction bars.[68] Unlike the merger ap-

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61 *See supra* notes 24–26 and accompanying text.

62 *See* Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 711 (2d Cir. 1987).

63 *See* VAN DEN BERG, *supra* note 24, at 349.

64 *See* New York Convention, *supra* note 8, art. VII.

65 *See* VÁRADY ET AL., *supra* note 25.

66 *See id.*

67 *See infra* Part IV.B.

68 While the argument that even these grounds are illegitimate reasons for refusing to recognize and enforce a foreign award under the New York Convention may be made here, the sufficiency grounds seem more clearly to fall within the narrowly defined public policy exception of Article V(2)(b) because of a nation's strong need to control its own dockets. *See* New York Convention, *supra* note 8, art. V(2)(b); *cf. supra* text accompanying notes 57–60 (discussing use of the New York Convention's public policy exception to vindicate national interests in res judicata).

proach, which invalidates otherwise enforceable foreign awards by replacing them with confirming foreign judgments,[69] perceiving the confirmation judgment as nonbinding outside the rendering state has no effect on the validity of the underlying award. Moreover, since the foreign court's validating judgment does not constitute a foreign arbitral award, no obligation to recognize and enforce it exists under the New York Convention.[70] As such, this approach neither hinders nor aids the enforcement process and does not violate a signatory's obligations under the New York Convention.[71]

II
PARALLEL ENTITLEMENTS: THE PREVAILING APPROACH IN THE UNITED STATES?

Since acceding to the New York Convention in 1970, the United States has addressed a number of questions related to international commercial arbitration.[72] However, the relationship between confirmation judgments and arbitral awards has rarely been addressed outside the Second Circuit.[73] This has occurred in large part because the vast majority of arbitration enforcement actions are filed in New York.[74] Moreover, New York's uniform judgment statute affords litigants significant leeway in enforcing foreign judgments.[75] Regardless of the reason for New York's unusually developed precedent, its law represents the most important statement of law in this area. Over a twenty-year period, the Second Circuit adopted the parallel entitlements approach to confirmation judgments.[76]

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69 *See supra* notes 50–52 and accompanying text.

70 *See* New York Convention, *supra* note 8, art. I.

71 *But see infra* Part IV.B (arguing for issue preclusion of the foreign court's decision, which could aid the enforcement process).

72 *See, e.g.*, Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764, 771 (9th Cir. 1992) (addressing whether an arbitral award fell within the scope of arbitration contemplated by the parties as required by Article V(1)(c)). Many of these cases likewise address the scope and application of the New York Convention defenses outlined *supra* note 12.

73 *See supra* note 24 (citing relevant Second Circuit cases). *But see* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 367–68 (5th Cir. 2003) (discussing enforcement actions in courts of "primary" jurisdiction as prevalent under the New York Convention).

74 *Cf.* Lionel Kennedy, Note, *Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention*, 23 VA. J. INT'L L. 75, 87 (1982) (referring to New York's "preeminence" in the areas of commerce and arbitration law in relation to enforcing arbitral awards falling outside the New York Convention's scope).

75 *See* Porisini v. Petricca, 456 N.Y.S.2d 888, 889 (N.Y. App. Div. 1982) (characterizing New York as "relatively generous" in recognizing foreign judgments). *But see* Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 714 (2d Cir. 1987) ("Neither the award nor the judgment may be viewed in isolation.").

76 *See* Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 29 F.3d 79 (2d Cir. 1994); Fotochrome, Inc. v. Copal Co., 517 F.2d 512

The Second Circuit first addressed the issue in *Island Territory of Curacao v. Solitron Devices.*[77] In that case, the court held that a judgment confirming an arbitral award could be enforced as a foreign money judgment under New York's foreign judgment recognition statute.[78] In articulating its decision, the court declined to decide the validity of the underlying arbitral award and left open the question of whether the extraterritorial merger doctrine applied.[79] By determining that the foreign arbitral award's validity was immaterial to a decision based on the judgment[80] and by allowing Curacao to recover upon the foreign confirmation judgment, the court adopted the parallel entitlements approach,[81] accepting the foreign confirmation judgment as a distinct entitlement to Curacao's recovery upon the arbitral award.[82]

The Second Circuit's decision in *Fotochrome, Inc. v. Copal Co.* confirmed the holding of *Island Territory of Curacao.*[83] The court addressed the issue of whether a Japanese arbitral award, which would have had the same effect as a final and conclusive judgment under Japanese law, allowed the award-holding party to execute its award as a judgment in New York.[84] In affirming the district court's decision to treat the arbitral award as an award under the New York Convention rather than a judgment, the Second Circuit noted that "the Japanese arbitral award may not itself be treated as a foreign money judgment."[85] While at first blush *Fotochrome* seems to contradict the parallel entitlements doctrine announced in *Island Territory of Curacao,* the court did not explicitly reject that approach. Instead, the Second Circuit elected to weave its decision through the framework of its earlier opinion by distinguishing between an arbitral award that is a self-executing judgment under foreign law (as in *Fotochrome*) and an arbitral award accompanied by a judgment confirming it (as in *Island Territory of Curacao*).[86] While a court's confirmation judgment would lead to parallel entitlements, the normal operation of a foreign statute would not.[87]

(2d Cir. 1975); Island Territory of Curacao v. Solitron Devices, 489 F.2d 1313 (2d Cir. 1973).

77 489 F.2d at 1313.

78 *See id.* at 1323. New York's foreign money judgments recognition statute can be found at N.Y. C.P.L.R. §§ 5301–5309 (McKinney 1997).

79 *See Island Territory of Curacao,* 489 F.2d at 1318 n.4.

80 *See id.*

81 *See id.*

82 *See id.*

83 517 F.2d 512, 518 (1975).

84 *See id.* at 518–19.

85 *See id.*

86 *See id.* at 519.

87 *See id.*

Despite some ambiguous dicta, the Second Circuit has consistently applied the parallel entitlements approach to foreign judgments based on arbitral awards since *Fotochrome.* In *Waterside Ocean Navigation Co. v. International Navigation, Ltd.*, the court expressed concern regarding the "duplicative litigation" created by confirmation judgments: "We do not think that the goals of the [New York] Convention would be served by having Waterside confirm the awards in England and then seek to enforce the English judgment in the United States."[88] Despite this foreboding language, the court cited the *Island Territory of Curacao* opinion and took for granted the parallel entitlements model.[89] Importantly, the Second Circuit later interpreted this language in *Waterside* to foreclose the merger issue it had left open in *Island Territory of Curacao* because the *Waterside* court upheld the district court's enforcement of the foreign arbitral award even though a foreign court had already converted the award into a possibly flawed judgment.[90] Consequently, *Waterside* is the analogue to *Island Territory of Curacao,* and the two cases together embody the parallel entitlements approach: the court may elect to recognize and enforce either the foreign arbitral award or the foreign confirmation judgment irrespective of the validity of the other claim. Subsequent Second Circuit cases have sustained this view.[91]

III
LITIGATION TACTICS CREATED BY APPLYING THE PARALLEL ENTITLEMENTS APPROACH

A. Overview

Under the parallel entitlements approach, the award-holding party can enforce either the arbitral award by federal statute,[92] or the judgment confirming the award through state law on the enforcement of foreign judgments.[93] Despite conventional wisdom that it is easier to enforce a foreign arbitral award than a foreign judgment, the foreign confirmation judgment may often be the preferable entitlement to pursue given some tactical advantages that foreign judgments have. For example, a plaintiff may elect to file a claim based on the judgment rather than the arbitral award if the arbitral award's statute of

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88 737 F.2d 150, 154 (2d Cir. 1984).

89 *See id.*

90 *See* Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 714 n.3 (2d Cir. 1987).

91 *See, e.g.*, Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 29 F.3d 79, 81 (2d Cir. 1994).

92 The New York Convention is codified as part of United States federal law, 9 U.S.C. §§ 201–207 (2005). 9 U.S.C. § 203 allows for federal jurisdiction over claims for the recognition and enforcement of foreign arbitral awards covered by the convention.

93 *See* Island Territory of Curacao v. Solitron Devices, 489 F.2d 1313 (2d Cir. 1973); *supra* Part II.

limitations for enforcement has run,[94] or if the plaintiff desires to circumvent the defendant's possible assertion of the deficiencies outlined in Article V of the New York Convention.[95] Further, by properly designing its claim, a plaintiff can prevent the defendant from removing the action to federal court.[96] Finally, a plaintiff's forum selection may also enable it to choose the substantive law that governs whether the entitlement is recognized and enforced.[97]

B. Tactics Created by Pursuing a Confirmation Judgment in Lieu of an Arbitral Award

1. *Circumvention of Statutes of Limitations*

Under the federal law incorporating the New York Convention, actions based on foreign arbitral awards must be filed within three years.[98] By contrast, actions filed based on state uniform-judgment statutes may not carry any statutes of limitations.[99] As such, under the parallel entitlements approach, a plaintiff may be able to file an otherwise stale foreign arbitral award as a timely claim to enforce a foreign confirmation judgment. In *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, the Second Circuit allowed this tactic when it enforced an award presented as a confirmation judgment despite the lapse of the statute of limitations for enforcing the award under the New York Convention.[100] The court's decision seems more striking given that the Second Circuit itself had previously ruled that the arbitral award was stale and therefore unenforceable.[101] Despite the initial entitlement's failure, the award holder in *Seetransport* received a favorable disposition because the Second Circuit saw the French court's grant of *exequatur* as a foreign judgment that gave rise to a new and independent entitlement.[102]

While this reasoning flows logically from the parallel entitlements model, it contravenes the policies underlying the statute of limitations for foreign arbitral awards. Statutes of limitations exist to ensure re-

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94 *See infra* Part III.B.1.

95 *See infra* Part III.B.2.

96 *See infra* Part III.B.3.

97 *See infra* Part III.B.4.

98 *See* 9 U.S.C. § 207 (2000). In contrast, domestic arbitral awards have only a one-year statute of limitations under the Federal Arbitration Act. *Problems in Enforcement of Foreign Arbitral Awards*, 6 WORLD ARB. & MEDIATION REP. 77, 78 (1995).

99 *See, e.g.*, N.Y. C.P.L.R. §§ 5301–09 (McKinney 1997) (containing no limitations provision).

100 *See* Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 29 F.3d 79, 80 (2d Cir. 1994).

101 *See* Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 989 F.2d 572, 581 (2d Cir. 1993).

102 *See Seetransport*, 29 F.3d at 82.

pose for defendants.[103] In the context of foreign arbitral awards, the statute of limitations defines a time lapse after which the party subject to the award may feel secure that its assets lie outside the reach of the award holder. Such a provision allows parties subject to arbitral awards to make rational decisions about the disposition of their assets.[104] Additionally, statutes of limitations prevent courts from having overburdened dockets and from adjudicating claims without sufficient evidence due to the lapse of time.[105] Thus, statutes of limitations in the arbitral award context secure important interests for the United States by ensuring that parties with assets in the United States can rationally allocate them and prevent untimely litigation from overburdening U.S. courts. Because the parallel entitlements approach ignores the statute of limitations for foreign arbitral awards enforced in the United States, it overlooks these interests. In this sense, the ability of an award holder to circumvent the statute of limitations for foreign arbitral award claims undercuts the congressional intent in enacting the three-year time frame for filing claims under the New York Convention.

2. *Circumvention of New York Convention Defenses*

Filing claims based on confirmation judgments under the parallel entitlements approach also allows award holders to avoid defendants' assertions of Article V defenses. Article V of the New York Convention outlines grounds for the refusal of a signatory to recognize and enforce a foreign arbitral award.[106] While a signatory may still elect to enforce an award that suffers from one or more Article V deficiencies,[107] the criteria listed in Article V both provide the party seeking to avoid enforcement with an arsenal of defenses and enable the party to flag possible defects for the reviewing court to examine before issuing a judgment on the award.

In contrast, a party defending against the enforcement of a foreign judgment generally has only defenses based on international public policy interests.[108] Courts have typically construed these defenses narrowly and accorded significant deference to foreign awards that meet basic notions of due process.[109] As a result, if an award-

103 *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 603 (6th ed. 2003) (outlining several policy reasons for statutes of limitations).

104 *Cf., e.g., id.* (describing how statutes of limitations in tort suits allow businesses to plan activities with greater certainty).

105 *See id.*

106 *See supra* note 12 and accompanying text.

107 *See supra* note 13 and accompanying text.

108 *See, e.g.*, Society of Lloyd's v. Turner, 303 F.3d 325, 330–32 (5th Cir. 2002) (stating that a breach of contract action is not contrary to Texas public policy).

109 *See, e.g., id.* at 331, 333; CIBC Mellon Trust Co. v. Mora Hotel Corp., 792 N.E.2d 155 (N.Y. 2003).

holding party chooses to enforce the arbitral award as a foreign judgment, it may limit the grounds on which the defendant can object to its enforcement. This may lead a court to enforce an award that it might otherwise deem unenforceable under Article V.

While federal courts of appeals have not ruled on the use of this tactic, the Southern District of New York has allowed a plaintiff holding parallel entitlements to enforce its confirmation judgment in a manner that prevented the defendant from asserting such Article V defenses.[110] The court allowed the tactic because although the defendant could not assert the New York Convention defenses in the second proceeding, it had the opportunity to raise these defenses in the initial litigation to confirm the judgment in the Netherlands.[111] The court reasoned that such defenses "simply do not apply to an Article 53 proceeding seeking recognition and enforcement of a foreign judgment, even if that judgment was based on a foreign arbitral award."[112] While the district court seemed ambivalent about whether a party defending against a foreign judgment would ever have an opportunity to plead Article V defenses at the recognition and enforcement stage,[113] this issue did not affect the court's holding.[114]

Article V defenses exist to protect defendants from the enforcement of a deficient award and to afford a screening mechanism to the enforcing state before employing the coercive power of its courts.[115] In outlining the Article V defenses, the New York Convention balances a pro-arbitration stance with national sovereignty because nations should have the right to refuse to enforce awards that run afoul of basic notions of justice.[116] While these defenses constitute only permissive grounds on which a court can refuse to enforce a judgment, Article V defenses ensure that a review of the award for fair process occurs at the enforcement stage. By permitting parties to enforce awards via foreign confirmation judgments while ignoring defendants' assertions of Article V defenses (as in *Ocean Warehousing B.V. v. Baron Metals & Alloys*),[117] courts enforce awards without first considering a potentially problematic arbitration process.

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110 *See* Ocean Warehousing B.V. v. Baron Metals & Alloys, 157 F. Supp. 2d 245, 249 (S.D.N.Y. 2001). *But see* Svendska Handselbanken v. Carlson, 258 F. Supp. 448, 450–51 (D. Mass. 1966) (holding that under Massachusetts state law a "defendant is entitled to all of the defenses he might have made to the original action" in the context of a nonarbitration case).

111 *See Ocean Warehousing*, 157 F. Supp. 2d at 250.

112 *Id.* at 249.

113 *See id.* at 250 & n.8.

114 *See id.* at 250.

115 *See* Quigley, *supra* note 55, at 1067–71.

116 *See* New York Convention, *supra* note 8, art. V(2)(b).

117 *See Ocean Warehousing*, 157 F. Supp. 2d at 250.

Parties defending against the enforcement of a confirmation judgment might be able to mitigate this concern by making equitable arguments. For example, a defendant could assert Article V defenses in a circuitous fashion by alerting the court to the apparent circumvention of the New York Convention that would occur in an action based on a confirmation judgment. However, there is no assurance that courts would be receptive to this type of argument. If not, then allowing award-holding parties to eliminate the Article V grounds as defenses would present a real danger.

3. *Destruction of Federal Jurisdiction*

Since the New York Convention applies by federal statute, original federal jurisdiction exists for claims based on foreign arbitral awards.[118] Nevertheless, because the statute does not grant exclusive jurisdiction to federal courts, it necessarily assigns concurrent jurisdiction to state courts.[119] However, even for an action filed in state court, the defendant can still remove the case to federal court based on federal question jurisdiction.[120] As such, Congress's incorporation of the New York Convention into U.S. law ensures that many cases decided under the Convention will be resolved in the federal courts.

Conversely, if the award-holding party seeks instead to enforce the foreign judgment confirming the arbitral award, it can file it under a state's foreign-judgments recognition statute in state court.[121] If brought under state law, a defendant cannot remove the action to federal court unless other grounds for federal jurisdiction exist.[122] Given that parties can take legitimate measures to destroy diversity jurisdiction,[123] a party seeking enforcement of its foreign confirmation judgment could potentially create exclusive state jurisdiction for that claim.

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118 *See* 9 U.S.C. § 203 (2000).

119 *See id.*; *see also* Tafflin v. Levitt, 493 U.S. 455, 459–61 (1990) (holding that states have concurrent jurisdiction unless divested "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatability between state-court jurisdiction and federal interests"); Gulf Offshore Corp. v. Mobil Oil Corp., 453 U.S. 473, 477–78 (1981) (outlining reasons for the general presumption of concurrent jurisdiction for cases arising under federal laws).

120 *See* 28 U.S.C. § 1441(a) (2000). Because 9 U.S.C. § 203 grants original jurisdiction to federal district courts and specifies New York Convention actions as "arising under the laws and treaties of the United States," § 1441(a) applies. Moreover, 9 U.S.C. § 205 further relaxes formal removal requirements, implying that actions based on federal arbitral awards should be readily removable to federal courts because of the strong federal interest at stake.

121 *See, e.g.*, N.Y. C.P.L.R. §§ 5301–09 (McKinney 1997).

122 *See* 28 U.S.C. § 1441(b).

123 Although 28 U.S.C. § 1359 prevents parties from collusively *creating* federal jurisdiction, nothing in the statute bars parties from intentionally *destroying* jurisdiction. *See* Ridgeland Box Mfg. Co. v. Sinclair Ref. Co., 82 F. Supp. 274, 276 (E.D.S.C. 1949).

The Southern District of New York again provides precedent supporting such forum shopping.[124] In *Gerling Global Reinsurance Corp. v. Sompo Japan Insurance Co.*, the court held that the New York Convention, along with its federal enabling statute, 9 U.S.C. § 203, "does not provide federal jurisdiction for an action seeking a declaration of the preclusive effect of a prior decision confirming an arbitral award."[125] While *Gerling* involved a domestic judgment confirming a foreign arbitral award, the language of the court's opinion would also seem to cover a case involving a foreign confirmation judgment.[126] The district court concluded that Second Circuit precedent narrowly defined the statute to confer federal jurisdiction when the invoking party seeks "either to compel arbitration or confirm an arbitral award."[127] An action to enforce a foreign judgment falls into neither of those categories. The literal wording of the opinion therefore implies that award-holding parties can destroy federal jurisdiction by filing a claim to enforce the foreign confirmation judgment under a state foreign judgments statute.[128] Courts in the Second Circuit are unlikely to overlook this formality and accept jurisdiction.

Because the New York Convention is an international treaty ratified by the United States, it imposes international legal obligations upon U.S. courts to follow its provisions.[129] Recognizing this, Congress assigned federal jurisdiction to claims arising under the convention in 9 U.S.C. § 203 and relaxed removal standards for these claims in 9 U.S.C. § 205. While this implementing legislation does not completely strip state courts of jurisdiction to hear claims under the New York Convention,[130] these federal jurisdictional grants should be viewed as a congressional preference for federal courts to satisfy the treaty obligations that the New York Convention imposes upon the United States.

The parallel entitlements approach allows plaintiffs to avoid federal jurisdiction by enforcing a foreign confirmation judgment instead of an arbitration award even though the substantive basis of both was the arbitrator's decision. This practice elevates form over substance at the expense of congressional preference. Treating the enforcement of a foreign arbitral award differently than a foreign con-

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124 *See* Gerling Global Reinsurance Corp. v. Sompo Japan Ins. Co., 348 F. Supp. 2d 102, 106 (S.D.N.Y. 2004).

125 *Id.*

126 *See id.*

127 *Id.* at 104–05 (citing Int'l Shipping Co. v. Hydra Offshore, 875 F.2d 388 (1989)).

128 However, the plaintiff's claim must be careful not to include a count based on the foreign arbitral award, since a federal court with jurisdiction over this claim via 9 U.S.C. § 203 could hear both claims under its supplemental jurisdiction. *See* 28 U.S.C. § 1367(a).

129 *See* Quigley, *supra* note 55, at 1064–65.

130 *See supra* note 119 and accompanying text.

firmation judgment allows plaintiffs to circumvent the congressional grant of federal jurisdiction by securing an exclusive state forum. This result seems incongruous with the policy of allowing federal courts to enforce national treaty obligations by adjudicating New York Convention claims. Another potential problem posed by allowing a plaintiff the choice of forum can arise if a state court denies the plaintiff's effort to enforce the foreign confirmation judgment upon grounds not recognized by the New York Convention. If a state court refuses to enforce an arbitral award for a reason other than an Article V ground, it technically violates the New York Convention.[131] But the Convention will not apply to an action to enforce a foreign judgment under state law, so states are free to enforce or deny such judgments for any reason.[132] However, because both entitlements have the same substantive basis—the arbitral award—foreign nations might not appreciate this difference that the form of the complaint creates.

In the United States, the refusal to enforce the foreign confirmation judgment will carry the force of law in every other state as a result of the Full Faith and Credit Clause of the Constitution[133] as well as principles of claim preclusion.[134] Thus, one state may prevent a plaintiff from securing relief upon a foreign judgment in any state. Under the parallel entitlements approach, however, states may deny judgments without violating the New York Convention because plaintiffs retain their claims based on the foreign arbitral awards.[135] Nevertheless, this tactic has the potential to confuse and anger other signatories to the New York Convention by treating two claims based on the same underlying award differently.

4. *Choice of Law*

Whether a plaintiff's claim arises under federal or state law affects the substantive law applied by federal courts.[136] This choice-of-law issue exacerbates the aforementioned problem of jurisdictional choice.

Because claims based on foreign arbitral awards arise under the New York Convention as a matter of federal law,[137] a state court or federal district court evaluating such a claim should apply the provi-

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131 *See supra* note 12 and accompanying text. Of course, states are still bound to follow the New York Convention under the Supremacy Clause of the Constitution. *See* U.S. CONST. art. VI, cl. 2.

132 *See infra* Part III.B.4.

133 U.S. CONST. art. IV, § 1.

134 Denial of a claim will trigger claim preclusion if the plaintiff tries to raise the same claim in another U.S. jurisdiction. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 17(2) (1982).

135 Given the interrelated nature of the claims, though, one might expect some messy preclusion problems here as well.

136 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

137 *See* 9 U.S.C. § 203 (2000).

sions of the New York Convention.[138] However, if a plaintiff pursued satisfaction of a foreign judgment, state law would apply, and a state court would apply the provisions its own law.[139] If a plaintiff pursued recognition of the foreign judgment under state law but filed a claim in a federal court based on diversity of citizenship,[140] the federal district court would be required to hear the case under state law even though the claim originated from a foreign arbitral award governed by federal law.[141]

Perhaps of equal concern as allowing plaintiffs the choice of forum, this choice of law would produce the anomalous situation in which a plaintiff could obtain federal jurisdiction through diversity of citizenship and then convince a federal court to decide the case on state law grounds despite a strong underlying federal element.[142] As explained above, it could also lead to the circumvention of Article V defenses, because they do not exist under state law.[143]

C. One Further Complication: The Effect of Full Faith and Credit

The Full Faith and Credit Clause of the Constitution,[144] along with its implementing legislation,[145] further obfuscates the possible reach of these tactics. Under the Full Faith and Credit Clause, "the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced."[146] Applying this principle to the present matter, suppose an award-holding plaintiff takes a foreign judgment confirming an arbitral award into a state with a foreign money judgments statute and obtains a state judgment based on the foreign judgment. Assuming the first state renders a valid judgment, the plaintiff could ostensibly enforce this state judgment in a second state under the Full Faith and Credit Clause even if the second state has no foreign judgments confirmation statute and therefore would only be

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138 *See id.* § 205; *supra* note 131.

139 *See, e.g.*, N.Y. C.P.L.R. §§ 5301–09 (McKinney 1997). A federal court would most likely not have jurisdiction to hear a satisfaction-of-a-foreign-judgment claim without diversity of citizenship and would, in such a case, be required to apply state law. *See Erie*, 304 U.S. at 64.

140 *See* 28 U.S.C. § 1332. This is a likely scenario given that many claimants are foreign parties attempting to gain recognition and enforcement of a judgment against American parties.

141 *See Erie*, 304 U.S. at 64.

142 *See, e.g., id.* at 77–78. *But see* Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1943) (holding that if a sufficiently high federal interest exists, federal courts may apply federal law).

143 *See supra* Part III.B.2.

144 U.S. CONST. art. IV, § 1.

145 28 U.S.C. § 1738.

146 Hampton v. McConnel, 16 U.S. (3 Wheat.) 234 (1818).

required to recognize and enforce the award through an action based on the New York Convention. If a claim based on the arbitral award becomes stale or would be invalid for reasons articulated under Article V,[147] this approach would require states to recognize an entitlement they would otherwise not need to honor solely because of a sister state's recognition laws. While this approach appears to be untested, it could signal a potential state sovereignty problem.

IV
MAKING THE CASE FOR A MODIFIED LIMITED-IN-SCOPE APPROACH

Given the tactics created by the parallel entitlements approach and the potential hazards they create for national policy,[148] the United States should resolve the relationship between foreign arbitral awards and confirmation judgments in favor of a new approach modeled after the limited-in-scope approach. Adopting this approach would conform to the United States' obligations under the New York Convention[149] without allowing the circumvention tactics outlined above.

Recall that the limited-in-scope approach requires the award holder to bring its claim for recognition and enforcement of a foreign arbitral award based on the award itself.[150] The foreign confirmation judgment confers no new entitlement on the plaintiff outside the jurisdiction of the court that rendered the judgment.[151] However, instead of completely disregarding the confirmation judgment for the purposes of the new litigation, courts outside the rendering jurisdiction should ignore it only when evaluating the sufficiency of the award holder's claim. This approach requires a plaintiff to file its claim under the New York Convention and its implementing federal legislation,[152] allowing the provisions governing statutes of limitations, Article V defenses, and federal jurisdiction to operate. This would in turn resolve any choice-of-law issues.

A modified limited-in-scope approach would still permit the foreign court's findings to be used for issue preclusion purposes, satisfy-

147 *See supra* note 12 and accompanying text.

148 *See supra* Parts III.B, III.C.

149 *See supra* Part I.B.3.

150 *See* VÁRADY ET AL., *supra* note 25.

151 *See supra* Part I.B.3.

152 By eliminating the entitlement based on the foreign judgment for sufficiency purposes, the limited-in-scope approach offers the plaintiff no choice as to how to pursue relief. *See supra* Part III.A (discussing various ways that plaintiffs can manipulate the parallel entitlements approach by choosing the means by which to seek relief).

ing the important public interests in judicial economy.[153] In this fashion, the limited-in-scope approach achieves the proper balance by giving the deference to foreign arbitral awards required by the New York Convention[154] without conferring a gratuitous entitlement upon plaintiffs.

A. How the Limited-in-Scope Approach Eliminates the Parallel Entitlements Tactics

The limited-in-scope approach eliminates many of the ill effects of jurisdictional tactics. By refusing to recognize a foreign judgment as having effect outside the rendering jurisdiction, a court applying this approach would leave the plaintiff with the foreign arbitral award itself as the only basis for recovery. The award then becomes subject to the provisions of the New York Convention and its implementing federal legislation.[155] Because these statutes apply directly to arbitral awards enforced under the Convention, a plaintiff cannot circumvent the statute of limitations or destroy federal jurisdiction, as it could by basing its claim upon a collateral foreign judgment.[156] Moreover, because such a claim arises under the New York Convention, the defenses found in Article V apply directly,[157] and the defendant need not attempt to plead these equitably and rely on the good graces of the court, as it must if the plaintiff attempts to enforce the confirmation judgment.[158]

B. Collateral Estoppel and the Confirmation Judgment

Using a foreign confirmation judgment for claim preclusion purposes seems to violate the United States' obligations under the New York Convention,[159] and allowing the foreign judgment to become a freestanding entitlement ignores important federal policies.[160] But allowing courts to examine a foreign confirmation judgment for issue preclusion purposes harms neither of these interests. Because a foreign court's confirmation judgment is not itself an arbitral award, it need only be analyzed as a foreign judgment and does not need to be analyzed under the New York Convention's requirements. Moreover, at present, no international covenant governing the recognition and

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153 For a law and economics explanation of these interests, see POSNER, *supra* note 103, at 593–94.

154 *See* New York Convention, *supra* note 8, art. V.

155 9 U.S.C. §§ 201–207 (2000).

156 *See supra* Part III.A.

157 *See id.* § 207.

158 *See supra* Part III.B.2.

159 *See supra* Part I.B.1.

160 *See supra* Part III.B.

enforcement of foreign judgments exists.[161] Therefore, unlike arbitral awards arising under the New York Convention, the United States has no international obligation to recognize and enforce foreign judgments.

Nevertheless, a foreign judgment confirming an arbitral award may have utility for courts because it represents an independent tribunal's examination of the arbitral award's validity. A proceeding to confirm an arbitral award in a foreign nation will likely examine similar issues to those a court in the United States would examine at the recognition and enforcement phase.[162] Given this similarity, simply ignoring the existence of the foreign judgment seems similarly problematic. The Supreme Court has held that a strong federal interest exists in the res judicata effect of a judgment.[163] Moreover, forcing American courts to reexamine issues that a competent court has already evaluated would crowd dockets and lead to other frivolous costs.[164] Consequently, American courts should require the award-holding party to file a claim under the New York Convention (and thus under federal law) but allow it to plead the confirmation judgment as res judicata on certain issues.

C. Laying Out the Proposal: A Two-Step Solution

1. *Step One: Eliminate Claims Based on the Foreign Judgment*

The first step in implementing the modified limited-in-scope approach would be to eliminate the foreign judgment as a separate entitlement. This could be done in one of several ways. First, Congress could forbid federal courts from considering such claims by statute.[165] However, while this would prevent plaintiffs' choice of state law in federal courts,[166] it would fail to regulate the filing of claims based on foreign judgments in state courts.[167] Another possibility would be for

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161 *See* Paige, *supra* note 7, at 622.

162 *See* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 368 (5th Cir. 2003) (discussing enforcement actions in courts of "primary" jurisdiction as evaluating more expansive provisions of domestic law than "secondary" courts in which recognition and enforcement are sought). *But see* Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 21 (2d Cir. 1997) (reading set-aside actions to allow application of domestic law in addition to New York Convention provisions).

163 *See* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 344–45 (2005).

164 *See* POSNER, *supra* note 103, at 593–94.

165 Congress has constitutional plenary power over the federal courts. *See* U.S. CONST. art. III.

166 *See supra* Part III.B.4.

167 Congress could ostensibly prevent state courts from hearing New York Convention claims altogether by amending the implementing statute to include an "explicit statutory directive" requiring exclusive jurisdiction. Tafflin v. Levitt, 493 U.S. 455, 459–61 (1990); *supra* note 119 and accompanying text. However, Congress might not be able to constitutionally prevent a state court from hearing a claim under its own state law, as such an action would raise serious federalism concerns.

each state to amend its Uniform Judgments Act to bar claims based on judgments that merely confirm foreign arbitral awards. However, this would pose a serious collective action problem.

As such, the best approach would be to overturn *Island Territory of Curacao*[168] and develop a practice of rejecting enforcement of confirmation judgments as a matter of federal common law.[169] This practice, in turn, would bind state courts, since the federal interest in implementing the New York Convention would preempt state uniform-judgments law according to the reverse-*Erie* doctrine.[170]

Because it would displace state law, this approach would inevitably raise federalism concerns. However, the interest of states in having their uniform judgments law apply to this small subset of claims seems relatively insignificant, while the federal interest in abiding by international treaty obligations seems more substantial.[171]

2. *Step Two: Allow Courts to Apply Issue Preclusion*

As outlined above, principles of judicial economy dictate that enforcing courts should not completely ignore foreign judgments confirming arbitral awards.[172] Instead, the second step in implementing the modified limited-in-scope approach calls upon courts to examine these judgments for issue preclusion (or collateral estoppel) effect. Such an approach would parallel the approach already taken under the New York Convention with regard to set aside.[173] Under the New York Convention, a court, in evaluating whether or not to enforce the set-aside award, will examine the set-aside ruling and decide whether to apply res judicata to the issues decided.[174] Similarly, a modified limited-in-scope approach would allow a plaintiff to plead the contents of a foreign confirmation judgment on the issues actually deter-

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168 *See* Island Territory of Curacao v. Solitron Devices, 356 F. Supp. 1, 14 (S.D.N.Y. 1973).

169 I am grateful to Professor Kevin Clermont for suggesting this approach.

170 *See* Johnson v. Fankell, 520 U.S. 911 (1997); Felder v. Casey, 487 U.S. 131 (1988); Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952); Brown v. W. Ry. of Ala., 338 U.S. 294 (1949). *See generally* Kevin M. Clermont, *Reverse-Erie* (Cornell Legal Studies, Research Paper No. 05-021, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=785124 (laying out the theory of how federal law applies in state court actions by preemption when state law interferes with the effect of federal law).

171 *See supra* Part III.B.3.

172 *See supra* notes 163–164 and accompanying text.

173 New York Convention, *supra* note 8, art. V1(e). If an award holder files a claim based on a foreign arhitral award, the defendant can raise set aside as a defense. This defense, however, does not bar the plaintiff's claim, but is merely a permissive ground for dismissal.

174 *See, e.g.*, Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172, 176–77 (S.D.N.Y. 1990) (noting that the set-aside provision of the Convention allows foreign courts to set aside only based on violations of the arbitral procedures and not an arbitrator's failings in applying substantive law).

mined. As it does in the case of set aside, the court would retain the capacity to reject applying res judicata and pass judgment on the issues if it opposes the foreign court's process.

As is usually the case with issue preclusion, the court examining collateral estoppel should not give any issue more preclusive effect than it would have under the law of the forum that rendered judgment on that issue.[175] The collateral estoppel approach would not require American courts to embrace foreign confirmation judgments based on defendants' defaults,[176] nor would it necessitate that courts deviate from common practice and apply collateral estoppel to issues not actually litigated.[177]

In this respect, the modified limited-in-scope approach achieves a balance between fairness and economy. It allows a foreign court's assessment to play a role in an American legal proceeding without being unduly controlling or conferring legal rights that may not be commensurate with American policy.

CONCLUSION

Despite the popularity of international commercial arbitration to settle disputes and the increasing number of claims filed based on foreign arbitral awards, little scholarship exists regarding how foreign judgments confirming arbitral awards relate to the original awards. Because this relationship affects the litigation strategies of parties in actions to recognize and enforce arbitral awards, this issue deserves closer inspection than has been devoted to it. In the United States, the Second Circuit has adopted the parallel entitlements approach that affords plaintiffs an additional means to gain recognition and enforcement of their awards. While this approach can be reconciled with the United States' obligations as a signatory of the New York Convention, it raises serious concerns by creating a cause of action that is independent and severable from its underlying source—the arbitral award.

By divorcing the foreign judgment from the award that it confirms, the parallel entitlements approach may lead to the counterintuitive result of allowing plaintiffs to satisfy awards under state law that would otherwise be unenforceable under the New York Convention.

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175 *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 95 (1971) (stating that the law of the state where the judgment was rendered should govern the issues determined by a valid judgment, subject to constitutional limitations); *see also* Harper v. Del. Valley Broadcasters, 743 F. Supp. 1076, 1082 (D. Del. 1990) (applying federal preclusion law to a federal bankruptcy court's judgment under Delaware choice-of-law rules).

176 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

177 *See id.*

Among the most serious calamities associated with creating an additional claim under the parallel entitlements approach are that it allows litigants to make an end-run around the federal statute of limitations for foreign arbitral awards and to circumvent defendants' Article V objections under the New York Convention. Perhaps most strikingly, this approach enables enforcing parties to guarantee state jurisdiction and the application of state law for issues that seem wholly federal. The clear federal interest in overseeing treaty performance, as well as a clear jurisdictional directive from Congress designed to ensure federal oversight, seems to demand a different outcome. By comparison, a modified limited-in-scope approach would allow the proper balance between facilitating the enforcement of foreign arbitral awards and protecting national interests. By examining foreign confirmation judgments for the contours of their decisions and applying issue preclusion, federal courts could ensure that plaintiffs with valid foreign awards can efficiently and reliably satisfy their claims. This approach would prevent plaintiffs from pursuing tactics that avoid important federal legislation, while also ensuring the federal scrutiny necessary for implementing an international treaty.